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Supreme Court, U.S.
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No. 97-1073

IN THE

Supreme Court of the United States

October Term, 1997

POLLY NELSON,

Petitioner,

v.

JOHN GRISHAM

and

BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the dismissal of a copyright infringement action where the courts below reviewed the works at issue and found no substantial similarity in their protectible expression.

PARTIES TO THE PROCEEDINGS

Respondent John Grisham ("Mr. Grisham") is an individual. Respondent Bantam Doubleday Dell Publishing Group, Inc. ("Doubleday"), a book publisher, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of New York.

RULE 29.6 LISTING

Respondent Doubleday is wholly owned by Bertelsmann, Inc., a corporation organized and existing under the laws of the State of Delaware. Doubleday has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
THE LOWER COURTS PROPERLY APPLIED THE RELEVANT STANDARDS OF COPYRIGHT LAW AND OPINIONS OF THIS COURT	4
A. Copyright Protects Only Original Aspects Of Non-Fiction Works	4
B. The District Court's Substantial Similarity Inquiry Was Proper	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978)	5,6
Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995)	9
Beal v. Paramount Pictures Corp., 20 F.3d 454 (11th Cir.), *cert. denied*, 513 U.S. 1062 (1994)	6,8,9
Berkic v. Crichton, 761 F.2d 1289 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985)	*passim*
CCC Info. Serv., Inc. v. MacLean Hunter Mkt. Reports, 44 F. 3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995)	4
Dr. Seuss Enterprises, L.P. v. Penguin Books USA, 109 F.3d 1394 (9th Cir.), *cert. dismissed*, __ U.S. __, 118 S. Ct. 27 (1997)	8,9,10
Engineering Dynamics, Inc. v. Structural Software, 26 F.3d 1335 (5th Cir. 1994)	9
Evans v. Wallace Berrie & Co., 681 F. Supp. 813 (S.D. Fla. 1988)	7
Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)	*passim*
Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823 (10th Cir. 1993)	9
GB Mktg. USA, Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F. Supp. 763 (W.D.N.Y. 1991)	8
Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)	*passim*
Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989)	9

Hoehling v. Universal City Studios, Inc.,
618 F.2d 972 (2d Cir.), *cert. denied*,
449 U.S. 841 (1980) 5,6,7

Lotus Dev. Corp. v. Borland Int'l, Inc.,
49 F.3d 807 (1st Cir. 1995), *aff'd per curiam*,
516 U.S. 233 (1996) 9

Masquerade Novelty v. Unique Indus.,
912 F.2d 663 (3d Cir. 1990)..... 8

Mazer v. Stein, 347 U.S. 201 (1954) 4

McCall v. Johnson Publishing Co.,
680 F. Supp. 46 (D.D.C. 1988)..... 8

Nash v. CBS, Inc., 899 F.2d 1537
(7th Cir. 1990)..... 5,6

Nelson v. Grisham, 942 F. Supp. 649
(D.D.C. 1996), *aff'd*, 1997 U.S. App.
LEXIS 28515 (D.C. Cir. 1997)..... *passim*

Nelson v. Grisham, 1997 U.S. App.
LEXIS 28515 (D.C. Cir. 1997)..... 3

Nichols v. Universal Pictures Corp.,
45 F.2d 119 (2d Cir. 1930), *cert. denied*,
282 U.S. 902 (1931) 6

Pasillas v. McDonald's Corp.,
927 F.2d 440 (9th Cir. 1991)..... 9

Segal v. Paramount Pictures, 841 F. Supp.
146 (E.D. Pa. 1993), *aff'd mem.*, 37 F.3d
1488 (3d Cir. 1994)..... 8

Shaw v. Lindheim, 919 F.2d 1353
(9th Cir. 1990)..... 4

Sid & Marty Krofft Television Prods.,
Inc. v. McDonald's Corp., 562 F.2d 1157
(9th Cir. 1977)..... 9

Television Digest v. United States
Tel. Ass'n, 841 F. Supp. 5 (D.D.C. 1993)..... 8

Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) 5,6

Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502 (7th Cir. 1994) 9

Williams v. Crichton, 84 F.3d 581 (2d Cir. 1996) 6,8,9

Zambito v. Paramount Pictures Corp., 613 F. Supp. 1107 (E.D.N.Y.), *aff'd mem.*, 788 F.2d 2 (2d Cir. 1985) 7

STATUTE

17 U.S.C. § 102(a) 4

BOOKS AND ARTICLES

Don DeLillo, *Libra (Penguin Books 1989)* 5

Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990) 5

John Grisham, *The Chamber (Doubleday 1994)* ..... *passim*

Norman Mailer, *The Executioner's Song (Warner Books 1979)* 5

Polly Nelson, *Defending the Devil: My Story as Ted Bundy's Last Lawyer (Morrow 1994)* ..... *passim*

Gore Vidal, *Lincoln (Random House 1984)* 5

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Respondents.

BRIEF IN OPPOSITION

Respondents John Grisham and Bantam Doubleday Dell Publishing Group, Inc. respectfully pray that the Court deny the instant Petition. After an "exhaustive examination" of John Grisham's *The Chamber* and Polly Nelson's *Defending the Devil: My Story as Ted Bundy's Last Lawyer ("Defending the Devil")*, the United States District Court for the District of Columbia determined that the two works were not "substantially similar" in their protectible expression and granted summary judgment for Respondents. That decision and the one-paragraph *per curiam* affirmance by the United States Court of Appeals for the District of Columbia Circuit reflect the application of well-established standards of copyright law. There is no conflict among the Circuits regarding those standards and no special or important reason to grant the Petition under Supreme Court Rule 10.

STATEMENT OF THE CASE

This copyright infringement lawsuit arises from *The Chamber*, John Grisham's fifth bestselling novel. *The Chamber* was published by Doubleday and released for sale on May 25, 1994. Polly Nelson's autobiographical non-fiction work *Defending the Devil* was first sold nearly nine weeks later.[1]

Not surprisingly, then, Petitioner does not allege a single instance of verbatim copying of *Defending the Devil*. Her claim instead rests on a hodgepodge of purported similarities of general themes, plot ideas, settings, and isolated words and phrases. Petitioner detailed these "similarities" in hundreds of pages of self-serving charts, in which carefully selected words and phrases were wrenched out of context and, at times, rearranged, to give the illusion of similarity. The District Court properly paid little heed to these materials, questioning their utility and veracity. *See Nelson v. Grisham*, 942 F. Supp. 649, 653 and n.2 (D.D.C. 1996), *aff'd*, 1997 U.S. App. LEXIS 28515 (D.C. Cir. 1997). An "expert's affidavit," which did little more than regurgitate the "similarities" set out in Petitioner's charts, also failed to impress the court. *Id.* at 652-53 and n.2.

Petitioner was forced to rely on these misleading, interpretative, secondary materials because the actual works at issue — *The Chamber* and *Defending the Devil* — are nothing alike. *Defending the Devil* is a stark work of non-fiction that methodically and chronologically portrays the vagaries of death penalty litigation. The people, places, and events depicted are real. As the District Court noted, Petitioner simply "memorialized her three-year-long involvement in the representation of death row inmate Ted Bundy." *Nelson*, 942 F. Supp. at 650. In essence,

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1. Oddly, in this case the allegedly infringing work was published **before** the work it purportedly infringed. Although Petitioner's submissions below sought to compare the texts of the two *published* works, her complaint alleged that Mr. Grisham copied from an 80-page *unpublished* proposal entitled *Peace, Ted*. Petitioner later reversed field, contending that Mr. Grisham copied from a 420-page draft of *Defending the Devil* entitled *Death is Different*.

Regardless of which of these works Petitioner now claims was pilfered, Ms. Nelson never offered any evidence that Mr. Grisham or his editor saw any version of *Defending the Devil* before publication of *The Chamber*. In fact, Mr. Grisham has expressly denied ever hearing of Ms. Nelson or her book prior to this lawsuit. Jt. App. 54-57. It is shocking, then, that Petitioner — without record support — now suggests that there is "evidence that [Mr. Grisham] in fact had a draft of Nelson's book in hand while writing *The Chamber*." Petition for Writ of Certiorari ("Pet. for Cert."), at 10. No such evidence exists; in fact, the only evidence in the record reflects just the opposite. In any event, the matter of access is not before the Court on this appeal.

Defending the Devil is a personalized news report about the twists and turns of Ted Bundy's post-conviction legal maneuvering.[2]

The Chamber, in contrast, "tells a much more personal story." *Nelson*, 942 F. Supp. at 654. It is the fictional tale of Adam Hall, a young man with a single-minded purpose: to understand and defend not just a condemned death row inmate, but his grandfather. The story takes place in less than a month, using traditional literary devices such as flashbacks and foreshadowing to unravel nearly 30 years of Adam's dark family history. *Id.* at 651. *The Chamber's* complex characters, exploration of familial relationships, haunting portrayal of racial discord in the South, and attention to descriptive detail — qualities lacking in *Defending the Devil* — strike a familiar chord with fans of Mr. Grisham's body of work.

Two courts now have reviewed these books and concluded that they are not similar, let alone substantially similar. Consistent with well-settled precedent, the District Court carefully examined the "concept and feel," plot, setting, time line, and characters of both works, in each case concluding that Petitioner's alleged similarities were "inaccurate," "simply not similarities," or involved unprotectible themes, plots, and settings. *Nelson*, 942 F. Supp. at 653-56. Holding that the books were not at all similar in their protectible expression, the court granted summary judgment for Respondents and dismissed the case. *Id.* at 656. The D.C. Circuit agreed.[3]

Dissatisfied with the results below, Petitioner seeks a third bite at the apple. Other than her belief that the lower courts reached an unjust decision, however, Petitioner offers no reason why this Court should re-examine these issues. The Petition should be denied.

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2. *Defending the Devil* is so rooted in real events and court proceedings that nearly 100 of its 336 pages consist of verbatim transcripts interspersed with a smattering of commentary. *See Defending the Devil*, at 177-250, 275-300.

3. The D.C. Circuit's one-paragraph *per curiam* opinion stated simply that "the district court's decision [is] affirmed substantially for the reasons set forth in the district court memorandum opinion." *Nelson v. Grisham*, 1997 U.S. App. LEXIS 28515 (D.C. Cir. 1997).

REASONS FOR DENYING THE WRIT

THE LOWER COURTS PROPERLY APPLIED THE RELEVANT STANDARDS OF COPYRIGHT LAW AND OPINIONS OF THIS COURT.

Petitioner entreats this Court to safeguard copyright protection for works of "introspective non-fiction,"[4] protection which she claims is threatened by the District Court's decision. In fact, that opinion faithfully adhered to this Court's statements on the scope of copyright protection for fact-based works. It recognized that non-fiction works such as Ms. Nelson's "receive[ ] equal protection under the copyright laws." *Nelson*, 942 F. Supp. at 656. At the same time, it underscored the reality that "often in non-fiction works there are many uncopyrightable elements." *Id.* Far from diluting copyright protection for non-fiction works, the District Court simply refused to grant to Petitioner the "monopoly on the stories of young attorneys who represent inmates on death row" that she sought. *Id.*

A. Copyright Protects Only Original Aspects Of Non-Fiction Works.

Originality is the linchpin of copyright. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991). To merit copyright protection, "a work must be original to the author." *Id.* at 345 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-49 (1985)); 17 U.S.C. § 102(a) (copyright subsists in "original works of authorship"). The fact that a work as a whole is copyrightable "does not mean that every element of the work may be protected." *Feist*, 499 U.S. at 348. Rather, only those aspects of the work that are original to the author are protectible. *Id.*; *Harper & Row*, 471 U.S. at 547 ("[C]opyright is limited to those aspects of the work — termed 'expression' — that display the stamp of the author's originality.").

The originality requirement means that facts and ideas contained in otherwise copyrightable works are not protected by copyright. *Feist*, 499 U.S. at 345; *Harper & Row*, 471 U.S. at 547; *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("[P]rotection is given only to the expression of the idea — not the idea itself."); *CCC Info. Serv., Inc. v. MacLean Hunter Mkt. Reports*, 44 F.3d 61, 68 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th

4. In an attempt to make *Defending the Devil* seem more akin to *The Chamber* and to expand the limited copyright protection given to non-fiction works, Petitioner invents this new genre of non-fiction. Her newly-minted moniker cannot provide those works with greater (or lesser) copyright protection than they currently enjoy.

Cir. 1990). Facts and ideas are excluded from protection because they do not "owe their origin to an act of authorship." *Feist*, 499 U.S. at 347. Therefore, "facts may be copied at will" and subsequent authors may "build freely upon the ideas and information conveyed by a work." *Id.* at 350 (citing *Harper & Row*, 471 U.S. at 556-57).

This principle "severely limits" the scope of protection for fact-based non-fiction works and has important implications for this case. *Feist*, 499 U.S. at 350. As stated by the Second Circuit, "absent wholesale usurpation of another's *expression*, claims of copyright infringement where works of history are at issue are rarely successful." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.) (emphasis added), *cert. denied*, 449 U.S. 841 (1980); *Nash v. CBS, Inc.*, 899 F.2d 1537, 1541 (7th Cir. 1990); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Alexander v. Haley*, 460 F. Supp. 40, 44-45 (S.D.N.Y. 1978). Petitioner's book is such a work of history — a factual narrative that "takes the reader through three years worth of appeals, from the daily grind of working on a capital case to the actual court hearings." *Nelson*, 942 F. Supp. at 654.

Simply put, the historical events that constitute the bulk of *Defending the Devil* — the facts of Ms. Nelson's and Ted Bundy's lives, the actions and emotions of the lawyers involved, the activities of politicians, prison officials, and journalists, and the exhaustive minutiae of death penalty litigation — are real, and Petitioner has no claim to their exclusive use.[5] As a result, even if Mr. Grisham had seen *Defending the Devil* prior to writing *The Chamber*, which he did not, he would have "had the right 'to avail himself of the facts contained' [therein] and to 'use such information . . . in his own literary work.'" *Hoehling*, 618 F.2d at 979 (quoting *Greenbie v. Noble*, 151 F. Supp. 45, 67 (D.N.Y. 1957). *See also Walker*, 784 F.2d at 49; *Feist*, 499 U.S. at 349 ("the very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers") (quoting Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990)).

In addition to excluding facts and ideas, the originality requirement also dictates that general themes, settings, and characters are outside the

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5. Examples of fictionalized accounts of historical events abound in American literature and popular culture. Gore Vidal's *Lincoln*, Don DeLillo's *Libra*, and Norman Mailer's *The Executioner's Song* are all fictionalized accounts of real events. The popular television drama *Law and Order* regularly uses actual crimes as the basis for its fictional storylines. Under Petitioner's theory of copyright, each of these fictional works would be "infringements" of the underlying historical facts.

scope of copyright protection. *See, e.g., Nash*, 899 F.2d at 1543; *Walker*, 784 F.2d at 48-50; *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985). The rationale for the exclusion of these categories was first articulated by Judge Learned Hand:

> Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). In *Nichols*, the Second Circuit affirmed summary judgment for the defendant because the only similarity between two plays was the common theme of "conflicts between Irish and Jews, into which the marriage of the children enters," an idea "too generalized" to be protected. *Id.*

This "idea-expression dichotomy" also explains why so-called *scenes a faire* — "situations and incidents which flow naturally from a basic plot premise" — are not protected by copyright. *Berkic*, 761 F.2d at 1293. *See Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996). Like facts and ideas, *scenes a faire* are not "original" to the author because they "flow naturally from the work's theme rather than the author's creativity." *Williams*, 860 F. Supp. at 167.

Cases applying the *scenes a faire* doctrine are legion. In *Alexander v. Haley*, for example, the court found that attempted escapes, flights through the woods pursued by baying dogs, the sorrowful or happy singing of slaves, the atrocity of the buying and selling of human beings, the sale of slave children, the horrors of punitive mutilation, and slave owners complaining about the high price of slaves were unprotectible *scenes a faire* in works about slavery. 460 F. Supp. at 45. Likewise, "[e]lements such as drunks, prostitutes, vermin, and derelict cars would appear in any realistic work about the work of policemen in the South Bronx." *Walker*, 784 F.2d at 48-50. *See also Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 463 (11th Cir.) (idea of a mosque-style palace with minarets unprotectible in a story about Arabian or African royalty), *cert. denied*, 513 U.S. 1062 (1994); *Hoehling*, 618 F.2d at 979 (scenes in beer hall, singing of the German national anthem, and German greetings to be expected in books about

Hindenburg disaster); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (sand dollars as currency, foods made from seaweed, seahorses for transportation, and plates made of oyster or mother of pearl attributable to common theme of an underwater civilization). In each of these cases, the courts properly concluded that such stock scenes were simply too common to be copyrighted.

Here, too, the District Court concluded that many of the "similarities" alleged by Petitioner were the natural result of the death penalty backdrop of both books. For example, "the presence of the media, politicians, and jail house personnel" and the "frenzy with which last minute appeals are made by both attorneys" were dismissed as stock events in books about death penalty litigation. *Nelson*, 942 F. Supp. at 653. Likewise, the emotions experienced by the protagonists and the condemned prisoners would be "expected" in such works. *Id.* at 655. Since Mr. Grisham "did not copy any unique expressions of Nelson," there can be no infringement. *Id.* at 653.

Recognizing the disastrous impact of the *scenes a faire* doctrine on her case, Petitioner makes an impassioned plea for its reversal. She argues that Respondents should not be allowed to rely on the *scenes a faire* doctrine unless they identify a specific "genre" to which both books belong. Putting aside the obvious fact that the genre here is literature addressing capital punishment, Petitioner does not identify a single case supporting her new requirement. The law simply does not require that library shelves overflow with books of a particular genre before the *scenes a faire* doctrine can apply. *See Hoehling*, 618 F.2d at 979; *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1111 (E.D.N.Y.), *aff'd mem.*, 788 F.2d 2 (2d Cir. 1985). The *scenes a faire* doctrine — without the new, unnecessary layer of complexity Petitioner seeks to graft to it — is no more than the logical extension of the bedrock principle that only an author's original expression is copyrightable.

Throughout this lawsuit, Petitioner has refused to accept even the most basic principles of copyright law, including the fundamental difference between uncopyrightable facts and ideas and her expression of them. The District Court, of course, recognized that Petitioner's "expression of her experiences receives protection under the law." *Nelson*, 942 F. Supp. at 656. *See Harper & Row*, 471 U.S. at 548 (President Ford's "original form of expression" of historical events is protectible). But Petitioner seeks much more. She would preserve for her exclusive use not just her expression of her experiences, but the experiences themselves. The courts below properly refused to grant Petitioner such a monopoly over historical events. This Court should do the same.

B. The District Court's Substantial Similarity Inquiry Was Proper.

In *Feist*, this Court reiterated the well-established test for copyright infringement. To succeed, a plaintiff must prove (1) ownership of a valid copyright[6] and (2) copying of *original* elements of her work by the defendant. *Feist*, 499 U.S. at 361 (emphasis added). *See Television Digest v. United States Tel. Ass'n*, 841 F. Supp. 5, 7 (D.D.C. 1993) (citation omitted); *Williams*, 84 F.3d at 587; *Dr. Seuss Enterprises, L.P. v. Penguin Books USA*, 109 F.3d 1394, 1398 (9th Cir.), *cert. dismissed*, __ U.S. __, 118 S. Ct. 27 (1997). Where, as here, a plaintiff cannot provide direct evidence of copying, she must establish that the defendant had access to her work[7] and that the two works are substantially similar. *McCall v. Johnson Publishing Co.*, 680 F. Supp. 46, 48 (D.D.C. 1988); *Williams*, 84 F.3d at 587; *Beal*, 20 F.3d at 459 (citation omitted).

Petitioner claims that the District Court erred by examining only the "protectible elements" of *Defending the Devil* in its substantial similarity analysis and by "ignor[ing] other evidence of copying." Pet. for Cert., at 7 & 9. She contends that the court instead should have examined whether *any* part of her work, including its uncopyrightable elements, was copied, and then analyzed whether that copying was of protectible or unprotectible elements. *Id.* at 7. Had the latter approach been followed, claims Petitioner, other evidence "probative of copying" would have been considered. *Id.* at 9.[8]

Petitioner's proposed approach fails for many reasons. Petitioner's contention that courts should examine whether a defendant copied noncopyrightable elements of the plaintiff's work

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6. Petitioner misrepresents the record when she states that Respondents have "conceded" her possession of a valid copyright in *Defending the Devil*. For purposes of their motion for summary judgment, Respondents agreed not to contest the validity of her copyright. Respondents did not, however, agree that the copyright was valid, primarily because Ms. Nelson failed to disclose the numerous uncopyrightable elements of the book on her copyright registration form. *See Masquerade Novelty v. Unique Indus.*, 912 F.2d 663, 667-68 and n.5 (3d Cir. 1990); *GB Mktg. USA, Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F. Supp. 763, 774-75 (W.D.N.Y. 1991).

7. The question of access is not at issue on this appeal. Early in this case, the parties agreed not to conduct discovery on the issue of access until after the District Court's ruling on Respondents' motion for summary judgment. The court's ruling obviated the need for that discovery.

8. Petitioner has apparently dropped her earlier contention that summary judgment is improper in copyright cases. Courts in every Circuit routinely determine substantial similarity as a matter of law and award summary judgment. *See, e.g., McCall*, 680 F. Supp. at 49; *Williams*, 84 F.3d 581; *Beal*, 20 F.3d 454; *Berkic*, 761 F.2d 1289; *Segal v. Paramount Pictures*, 841 F. Supp. 146 (E.D. Pa. 1993), *aff'd mem.*, 37 F.3d 1488 (3d Cir. 1994).

in determining whether the works are substantially similar is contrary to *Feist's* holding that copyright protection is limited to those parts of a work that are original to the author. *Feist*, 499 U.S. at 348; *Harper & Row*, 471 U.S. at 547. The District Court's inquiry into whether *The Chamber* copied the "protected elements" of *Defending the Devil* thus represents no more than the routine application of *Feist's* rule that a plaintiff must show copying of "constituent elements [of the work] that are original." *Feist*, 499 U.S. at 361.

Every Circuit that has reached this issue has agreed that, in determining whether two works are substantially similar, only protected elements of the plaintiff's work should be examined. *See, e.g., Dr. Seuss*, 109 F.3d at 1398-99; *Williams*, 84 F.3d at 587; *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 813 (1st Cir. 1995), *aff'd per curiam*, 516 U.S. 233 (1996); *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340-41 (5th Cir. 1994); *Beal*, 20 F.3d at 458-59; *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508-09 (7th Cir. 1994); *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 831-33 (10th Cir. 1993).

The Ninth Circuit — where Petitioner erroneously looks for support — is no exception.[9] Recent decisions of that court make clear that the so-called "extrinsic test" of substantial similarity is actually a means "to determine the scope of copyright protection before works are considered as a whole." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994), *cert. denied*, 513 U.S 1184 (1995). *See Pasillas v. McDonald's Corp.*, 927 F.2d 440, 443 (9th Cir. 1991) (copyright holder cannot rely on noncopyrightable "standard elements" to show infringement); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207-08 (9th Cir. 1989) (trier of fact must eliminate unprotectible aspects of plaintiff's work from infringement inquiry). Thus, the Ninth Circuit, too, has clarified that courts should examine only whether the *protectible* elements of an allegedly infringed work were copied. *See Dr. Seuss*, 109 F.3d at 139 (affirming preliminary injunction where district court eliminated uncopyrightable elements from comparison of works). Significantly, the court noted that its

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9. The Ninth Circuit traditionally used a two-step approach to evaluate substantial similarity. In *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), for example, the two works were subjected to an "extrinsic test" which examined whether they were substantially similar in their "general ideas." *Berkic*, 761 F.2d at 1292 (citing *Krofft*, 562 F.2d at 1164). Only if the works were similar at that level did the Court examine whether there was substantial similarity in the expression of those ideas. *Id.* To prevail, the plaintiff was required to show substantial similarity of *both* ideas and expression. *Id.*

traditional two-step approach was modified in order to "bring[ ] it more in line with the test followed in other circuits." 109 F.3d at 1398.

This case finds no split in the Circuits and offers no issue beyond the routine application of basic principles of copyright law. This is hardly the kind of landscape that merits tending by this Court.

CONCLUSION

From the start, this case has presented a simple question: whether *The Chamber* and *Defending the Devil* are substantially similar works. After an exhaustive review of both books, the District Court answered that question in the negative, finding that no amount of zealous advocacy "can[ ] create substantial similarity where none exists." *Nelson*, 942 F. Supp. at 656. The D.C. Circuit agreed. Petitioner has advanced no reason to disturb these unremarkable conclusions or the rudimentary principles of copyright law that compelled them.

For the foregoing reasons, Respondents John Grisham and Bantam Doubleday Dell Publishing Group, Inc. respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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